85-406

No. 85-

SUPREME COURT, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

GEORGE R. ARIYOSHI, GOVERNOR,
STATE OF HAWAII, *et al.*,
Petitioners,

v.

SELWYN A. ROBINSON, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether the rejection by the highest court of a state of a timely presented petition for rehearing asserting that an opinion and judgment of that court have "taken property," and otherwise violated the requirements of due process, is a "final determination" of such constitutional claims from which appeal may be had only in this Court, and not in the inferior federal courts?

2. Whether a federal court is empowered to, or should as a matter of comity, declare that a state court opinion and judgment have "taken" property for public use and without proper hearing when state court proceedings have yet to determine whether the state is equitably entitled to do anything to interfere with such alleged property rights, and no state official has done anything to enforce the assertedly unconstitutional judgment?

3. Whether due process requirements are satisfied by the allowance of four months to prepare written memoranda to support a petition for rehearing to a state court facially challenging a judicial opinion as having violated federal rights, and thus whether a federal court must, under 28 U.S.C. § 1738 (1982), give the same preclusive effect to rejection of the petition as would the state court?*

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* Petitioners include George R. Ariyoshi, Governor of the State of Hawaii; Corinne K. A. Watanabe, Attorney General, State of Hawaii; John Y. Arisumi, J. Douglas Ing, Moses W. Kealoha, Roland H. Higashi, Leonard H. Valopany, and Susumu Ono, members and chairman, Board of Land and Natural Resources, State of Hawaii. Defendants below included then-Acting Governor Ariyoshi, Attorney General George T. H. Pai, Deputy Attorney General

Andrew S. O. Lee, and members of the Board of Land and Natural Resources Sunao Kido, Newton Miyagi, Larry E. Mehau, Manuel Monix, Jr., Moses W. Kealoha, and Hisao Munechika. The state officials named below have been succeeded as indicated. Petitioners appear before this Court in their capacities as officers of the State of Hawaii.

Plaintiffs and cross-claimants below, and Respondents before this Court include Selwyn A. Robinson, Eleanor Robinson, Russell S. Robinson, Ruth R. LeFiell, Marian R. Keat, Jean R. Weir, Selwyn A. Robinson, Eleanor Robinson, Bruce B. Robinson, Trustees under the Will of Aylmer F. Robinson, Helen M. Robinson, Individually and as Executrix, Estate of Lester B. Robinson and Keith P. Robinson, McBryde Sugar Co., Ltd., Olokele Sugar Co., Ltd., Ida Albarado, Helen B. H. Chu, Henry H. Chu, Chee Kung Fui Society, Lapaz Francisco, Marcellino Francisco, Albert K. Kaailau, Linda P. Kaiakapu, Ann N. Kali, Harriet U. Kano, Junichi Kano, Kiyoshi Kimata, Arnold W. F. Leong, Katherine A. Leong, Lo Sun D. Leong, Tai Hing Leong, Hanayo T. Naumu, Wallace A. Naumu, Hideo Nonaka, Hiromi Nonaka, Masatoshi Nonaka, Shigekichi Nonaka, Takano Nonaka and Takao Nonaka.

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IN THE

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No. 85-

GEORGE R. ARIYOSHI, GOVERNOR,
STATE OF HAWAII, *et al.*,
Petitioners,

v.

SELWYN A. ROBINSON, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The petitioners, George R. Ariyoshi, et al., officers of the State of Hawaii ("State officials"), respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on February 20, 1985.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 753 F.2d 1468 (9th Cir. 1985) (*"Robinson III"*). The opinion of the Supreme Court of Hawaii proffering answers to questions certified by the United States

Court of Appeals on April 28, 1981, is reported at 65 Hawaii 641, 658 P.2d 287 (1982) (*"Robinson II"*). The opinion of the United States District Court for the District of Hawaii is reported at 441 F. Supp. 559 (D. Hawaii 1977) (*"Robinson I"*). Other opinions related to this petition include those of the Supreme Court of Hawaii giving rise to the litigation in the courts below, *see McBryde Sugar Co.* v. *Robinson,* 54 Hawaii 174, 504 P.2d 1330 (*"McBryde I"*), *aff'd on rehearing,* 55 Hawaii 260, 517 P.2d 26 (1973) (*"McBryde II"*), *appeal dismissed and cert. denied,* 417 U.S. 962, 976 (1974) (*"McBryde III"*).

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on February 20, 1985. A timely petition for rehearing and suggestion of the appropriateness of rehearing *en banc* was denied on May 14, 1985. On July 19, 1985, Associate Justice William H. Rehnquist, upon petitioners' application, ordered that the time for filing this Petition be extended to and including September 11, 1985, and this Petition was filed within the time allowed. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1) (1982). Jurisdiction in the United States District Court was alleged to have been conferred by 28 U.S.C. §§ 1331, 1343, 2201, 2283 (1970), as amended, and by 42 U.S.C. § 1983 (1970).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article III, section 2, clause 1 of the United States Constitution provides in relevant part that

> The Judicial Power [of the United States] shall extend to . . . Cases . . . [and] to Controversies . . . .

Article IV, section 1 of the United States Constitution provides that

> Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.

The Fifth Amendment to the United States Constitution provides in relevant part that

> No person shall . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The Fourteenth Amendment to the United States Constitution provides in relevant part that

> No state shall . . . deprive any person of life, liberty, or property, without due process of law . . . .

Section 1257 of Title 28 of the United States Code provides in relevant part that

> Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court . . .

Section 1738 of Title 28 of the United States Code provides in relevant part that

> The records and judicial proceedings of any court of any . . . State, Territory or Possession [of the United States] . . . shall have the same full faith and credit in every court within the United States

> and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.

Section 2201 of Title 28 of the United States Code provides in relevant part that

> In a case of actual controversy within its jurisdiction . . . any court of the United States . . . may declare the rights and other legal relations of any interested party . . . .

The "Principles Adopted by the Board of Commissioners To Quiet Land Titles in Their Adjudication of Claims Presented to Them," as Ratified by the Legislative Council October 26, 1846, Stat. L. Kamehameha III 81-94 (1847), *codified at* II Rev. L. Hawaii 2124 (1925), the "Enactment of Further Principles," 1850 Hawaii Sess. L. 202-04, *codified at* II Rev. L. Hawaii 2141 (1925), *recodified at* Hawaii Rev. Stat. § 7-1 (1968), selected portions of Hawaii Rev. Stat. chs. 602 and 664 (1968 and 1976 eds.) relating to the jurisdiction of the Supreme Court of Hawaii and the jurisdiction of the Circuit Courts of Hawaii sitting as Commissioners of Private Ways and Water Rights, Hawaii Sup. Ct. R. 5 (1968), which governed until 1980 the treatment of petitions for rehearing in the Supreme Court of Hawaii, and Hawaii Sup. Ct. R. 20 (1980), authorizing that court to answer certified questions from the Courts of Appeals of the United States, are reprinted in relevant part in the Appendix to this Petition.*

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* Because the record necessary to this Court's consideration of this Petition is voluminous, record material has been reprinted in a separate Appendix. References to the printed record appear within as, *e.g.*, "A ——."

STATEMENT OF THE CASE

In adjudicating disputes over water usage the courts of the monarchy, then republic, then territory, and now State of Hawaii, have struggled to reconcile Hawaii's ancient communal and missionary traditions, and the statutes and doctrines that embody these values, with the demands of private agricultural enterprise. In untangling the web of statute and decisional law governing these conflicts, the Hawaii courts have proceeded on a slow, cautious, and, at times, even piecemeal basis, for the very reason that "property," once vested, may not be "taken" for public use without "just compensation." *Chicago, Burlington & Quincy R. Co.* v. *Chicago,* 166 U.S. 226 (1897), *cited, Hawaii Housing Authority* v. *Midkiff,* 104 S. Ct. 2321, 2331 n.7 (1984).

The issue in this case is whether this process of case by case adjudication may be permanently aborted by the intervention of an inferior federal court employing the Takings Clause to review, and invalidate in wholesale fashion, an opinion of the Supreme Court of Hawaii construing statutes dating from 1846 upon which the entire Hawaiian property system is based, in a case acknowledged to pose no immediate threat to "vested" property rights, in which state court processes stand ready to vindicate alleged property rights and constitutional claims that may arise from application of the allegedly "unconstitutional" opinion, and in which facial constitutional challenges to that opinion had been asserted before, and rejected by, not only the Supreme Court of Hawaii, but this Court as well.

A. Proceedings Leading to Direct Review in This Court: *McBryde I, II,* and *III*

As acknowledged by the District Court, "this case," *Robinson I,* 441 F. Supp. at 562, A 59, began on March 24, 1959, with the filing of a complaint by McBryde Sugar Company, Ltd. ("McBryde"), in the then-territorial court for the Fifth Judicial Circuit, Kauai, Hawaii, sitting as Commissioner of Private Ways and Water Rights, with jurisdiction "to hear and determine all controversies respecting . . . water rights[,]" Hawaii Rev. L. § 234-31 (1955), *recodified at* Hawaii Rev. Stat. § 664-32 (1968), A 427.

In its amended complaint, dated April 25, 1960, McBryde, a downstream owner of lands along the Hanapepe River within the Ahupuaa of Hanapepe[1] on the island of Kauai, complained that members of the Gay & Robinson partnership ("G&R"), owners of upstream lands adjoining the Hanapepe River, and its tributary, the Koula Stream, had violated McBryde's water rights through "a new system of ditches and tunnels, [erected on G&R's land, which were] diverting and conveying away . . . large quantities of water[,]" Amended Complaint ¶ VII, A 308. Also named as respondents on the basis of their potential claims to Hanapepe River water were Olokele Sugar Company, which held a beneficial interest in G&R's alleged illegal diversions, and the now-State of Hawaii and others ("the Small Owners"), which, like Mc-

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[1] This Court is already familiar with the term "ahupuaa," the "large land units" allotted during "the Great Mahele or royal land division" in 1848, *Kaiser Aetna* v. *United States,* 444 U.S. 164, 167 (1979), which run from the mountains to the sea on the several Hawaiian Islands.

Bryde, owned downstream land in the Hanapepe watershed. *Id.* ¶ VII, Second Count ¶¶ 5-6, Fourth Count ¶ 4, A 308, 313, 315-16.

On May 24, 1960, the State answered, praying "that a hearing be held for a determination of the respective rights of all parties to the waters of Hanapepe River[.]" State Answer at ¶ 2, A 319. G&R, Olokele, and the Small Owners filed similar answers and on September 13, 1963, pursuant to law, default was entered as to all who had not appeared. A 298. In 1965, the Circuit Court held evidentiary hearings, compiling a record of nearly 3,500 pages, focusing on factual disputes engendered by the parties' various claims. A 163.

1. The Legal Framework of Water Rights Adjudication

The trial court's work in applying the law weighed as heavily as its factfinding burden. As McBryde recognized, the court's first task was to determine when "rights to water by ancient custom did not pass with the award of land" in the royal land division of 1848.[2] Once rights "appurtenant" to Land Commission award were known,[3] the court had to ascertain to what extent

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[2] McBryde Post-Trial Opening Brief at 3 n.1, *McBryde Sugar Co.* v. *Robinson*, S.P. No. 108 (Hawaii Cir. filed Sept. 20, 1965), A 322; *see also* Answering Brief on Behalf of Selwyn A. Robinson at 22 ("[T]he truth that the Land Commission awards are the ultimate origin of title applies with especial force to water."), *McBryde Sugar Co.* v. *Robinson*, No. 4879 (Hawaii filed June 1, 1970), A 352.

[3] *See* Brief on Behalf of Selwyn A. Robinson at 2, *McBryde Sugar Co.* v. *Robinson*, No. 4879 (Hawaii filed Dec. 29, 1969) ("An award of land by Land Commission, or a grant of land by the

rules of prescriptive ownership vested title to such rights in a new owner.[4] Third, and finally, the court would have to distribute "surplus" waters—those in excess of the sum of waters reserved by the sovereign (and not passed into private ownership by Land Commission award) and of those waters that originated as appurtenant to a parcel of land.[5] If there were "surplus" waters, allocating this " 'last right' "[6] required determining ownership arising by prescription.[7] Complicating each inquiry was the problem of construing the judgment in *Territory* v. *Gay,* 31 Hawaii 376 (1930), *aff'd,* 52 F.2d 356 (9th Cir.), *cert. denied,* 284 U.S. 677 (1931), to which the State's and G&R's predecessors had been parties, and which was tried on the stipulation that "surplus" waters existed in the Hanapepe watershed, and "ancient rights" of downstream

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Crown included the right to the quantity of water that was used on the parcel awarded or granted 'at and immediately before the date of the grant.' " (citation omitted)), A 333.

[4] *See id.* at 3, "[P]rescription is a way in which one person can acquire rights which formerly belonged to another private individual by appurtenant . . . rights."), A 333.

[5] *See id.* at 2 (" 'Surplus water' [i]s all the water remaining after appurtenant rights are satisfied which belongs to the konohiki [Land Commission awardee] of the ahupuaa or ili kupono." (citation omitted)), A 333.

[6] McBryde Opening Post-Trial Brief at 2, *McBryde Sugar Co.* v. *Robinson,* S.P. No. 108 (Hawaii Cir. filed September 20, 1965 (citation and footnote omitted)), A 321.

[7] *See* Brief on Behalf of Selwyn A. Robinson at 3, *McBryde Sugar Co.* v. *Robinson,* No. 4879 (Hawaii filed December 29, 1969) at 3) ("[P]rescription is a way in which one person can acquire rights which formerly belonged to another private individual by . . . surplus rights."), A 333.

riparian owners were to be left to future litigation. *See* 31 Hawaii at 382; *cf. Ruckelshaus* v. *Monsanto Co.*, 104 S. Ct. 2862, 2872 (1984) (construing stipulation, "the exact import of [which] is not clear").

2. What the State Trial Court Did

Within this framework, the trial court concluded: (1) no rights to water had been reserved by the sovereign, and thus Land Commission award conveyed *all* water rights formerly held by the King;[8] (2) each plot of land that had been " 'enjoying the use of water for the cultivation of taro or for garden purposes or for domestic purposes' " at the time " 'immediately prior to the grant' " enjoyed an "appurtenant" right to such water customarily used for such purposes;[9] (3) all of the "surplus waters" belonged to G&R, "on whose land they arise";[10] except for (4) 2,084,600 gallons per day, which McBryde had obtained title to by prescription.[11]

3. What the Supreme Court of Hawaii Did

McBryde, G&R, and the State appealed, and, on appeal, the Supreme Court of Hawaii reversed all but the second of the trial court's rulings. *McBryde Sugar Co.* v. *Robinson*, 54 Hawaii 174, 504 P.2d 1330 (1973) (*"McBryde I"*), A 163. In so holding, the Supreme

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[8] *McBryde Sugar Co.* v. *Robinson*, S.P. No. 108 (Hawaii Cir. 1969), A 250.

[9] *Id.*, A 247.

[10] *Id.*, A 260.

[11] *Id.*, A 260-61.

Court of Hawaii employed the identical framework for adjudicating water controversies used by the trial court, and, indeed, espoused even by the private parties.[12] Where the Justices parted ways with the trial court was in their reading of statutes that had been cited in the *private landowners'* briefs,[13] and in their analysis of the preclusive effect of *Territory* v. *Gay,* 31 Hawaii 376 (1930).

Thus, after reviewing the Land Commission *Principles,* Stat. L. Kamehameha III 81-94 (1847), A 417, the underlying grant empowering the Commission to make awards, and which prohibit " 'surrender' " of the King's " 'sovereign prerogatives,' " including that " '[t]o encourage and even to enforce the usufruct of lands for the common good[,]' " 54 Hawaii at 186, 504 P.2d at 1338, A 173, *McBryde I* held, because "the right to water is one of the most important usufruct of lands, . . . the State is the owner of the water in the Koula Stream and Hanapepe River." 54 Hawaii at 186-87, 504 P.2d at 1338-39.[14] Having reversed the trial court's first holding, *McBryde I* nevertheless affirmed the landowners' "appurtenant right[s] to water

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[12] *See* sources cited *supra* notes 2-7.

[13] *See, e.g.,* Stat. L. Kamehameha III 81-94 (1847), *codified at* II Rev. L. Hawaii 2124, 2128 (1925) and 1850 Hawaii Sess. L. 202, *codified at* II Rev. L. Hawaii 2141, 2142 (1925), *recodified at* Hawaii Rev. Stat. § 7-1 (1968), *cited in* Brief on Behalf of Selwyn A. Robinson, *McBryde Sugar Co.* v. *Robinson,* No. 4879 (Hawaii filed December 29, 1969) ("Chronology"), A 329.

[14] A 173-74. This holding assertedly applied only "as between the State and McBryde, and between McBryde and Gay & Robinson," 54 Hawaii at 187, 504 P.2d at 1339, A 174, but was given further effect under the court's analysis of *Territory v. Gay, see* 54 Hawaii at 199 & n.22, 504 P.2d at 1345 & n.22, A 186-87.

for taro growing," as determined by the trial court, *id.* at 188, 504 P.2d at 1339, A 175. *McBryde I* limited use of such water, however, to "that particular parcel of land to which the right is appurtenant," *id.* at 191, 504 P.2d at 1341, A 178, a holding backed by the court's construction of Hawaii Rev. Stat. § 7-1 entitling downstream riparian owners "to the natural flow of the stream without substantial diminution and in the shape and size given it by nature," *id.* at 198, 504 P.2d at 1344, A 185.

These rulings, based on statutes dating to 1846, led to reversal of the trial court's two remaining holdings—those relating to G&R's right to "surplus" waters and McBryde's prescriptive title. Acknowledging that *Territory* v. *Gay* was *res judicata* as between the State and G&R, *id.* at 179, 504 P.2d at 1335, A 166, the court construed the judgment therein as binding the State only to a ruling that G&R owned the "normal" surplus waters arising on its land, *id.* at 199, 504 P.2d at 1345, A 186. Because all rights in excess of appurtenant rights were held to have been reserved, and not passed under Land Commission award, G&R's "last right" entitled it "to nothing under [*Territory* v. *Gay*]," *id.* The statutory rulings also mooted McBryde's prescriptive rights, for as even the private landowners agreed,[15] "prescription could not run against the government," *id.* at 198, 504 P.2d at 1345, A 186.

To preserve a right to review in this Court, the private landowners invoked the rehearing process of the

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[15] *See, e.g.*, Brief on Behalf of Selwyn A. Robinson at 3, No. 4879 (Hawaii filed December 29, 1969) ("Prescription cannot run against the sovereign[.]"), A 333.

Supreme Court of Hawaii. Under then-Hawaii Sup. Ct. R. 5 a petition for rehearing would have been considered timely filed "within 10 days after the filing of the opinion or ruling unless by special leave additional time [wa]s granted during such period by a justice[,]" A 432. On January 15, 1973, the private landowners were granted *more than four months* of "additional time." *See* A 302 (noting extension of time to May 20, 1973). During those four months, the private landowners prepared extensive petitions that were filed in the Supreme Court of Hawaii raising federal constitutional and statutory objections to the court's rulings.[16] McBryde, for example, asserted the Justices had violated the Takings Clause, the requirements of due process, and other federal rights.[17] Alleged misapplications of state law, on which were predicated the federal claims, were also asserted as grounds for rehearing.[18] On June 18, 1973, the court ordered additional briefing and argument on the materiality of Hawaii Rev. Stat. § 7-1 (1968) and the ultimate issue

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[16]Although then-Rule 5(b), Hawaii Sup. Ct. R. 5(b) (1968), provided "[t]here shall be no oral argument on a petition for rehearing," the private landowners filed lengthy "points and authorities," Hawaii Sup. Ct. R. 5(a). McBryde's alone comprised 127 legal-size pages, excluding appendices, affidavits, and the petition itself, *see* A 353-57; *cf.* Sup. Ct. R. 21.4 (page limit for this Petition). These papers were circulated among "the [entire] court as constituted when the case was decided," *Rohlfing* v. *Moses Akiona, Ltd.*, 45 Hawaii 440, 443, 369 P.2d 114, 116 (1962) (per curiam).

[17] McBryde Petition for Rehearing at 1-3, *McBryde Sugar Co.* v. *Robinson*, No. 4879 (Hawaii filed May 21, 1973), A 358-60; *see also* Robinson Petition for Certiorari Appendix A (Petition for Rehearing filed May 18, 1973 (same)), *Robinson* v. *Hawaii*, No. 73-1441 (U.S. 1974), A 403-05.

[18] *See* sources cited *supra note*.

of transferability of appurtenant water rights.[19] In all other respects the petitions for rehearing were denied.[20] *McBryde II,* 55 Hawaii at 261, 517 P.2d at 27, A 113. Upon rehearing, the Supreme Court of Hawaii affirmed its original opinion, *id.,* and entered judgment accordingly. A 280-81.

4. What This Court Did

By appeal and petition the private landowners carried their federal claims to this Court. McBryde, Olokele, G&R, and the Small Owners each asserted, even after *McBryde II,* that the Justices had violated the Fourteenth Amendment by "taking" property without just compensation and without notice and hearing. *See* Jurisdictional Statement at 3-4 ("questions presented" nos. 2, 4), *McBryde Sugar Co. Ltd. and Olokele Sugar Co., Ltd.* v. *Hawaii,* No. 73-1440 (U.S. 1974), A 412; Petition for Certiorari at 2-3 ("questions presented" nos. 1, 2), *Albarado et al.* v. *Hawaii,* No. 73-1442 (U.S. 1974), A 408-09; Petition for Certiorari at 2-3 ("questions presented" nos. 2, 3), *Robinson et al.* v. *Hawaii,* No. 73-1441 (U.S. 1974), A 384.

On June 17, 1974, this Court rejected the private landowners' federal claims. *See* 417 U.S. 962, 976

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[19] Justice Marumoto disssented solely from *McBryde I*'s treatment of these issues. *See* 54 Hawaii at 201, 504 P.2d at 1346 (Marumoto, J., dissenting). A 189.

[20] Nevertheless, it was open to the landowners to argue that as a matter of *statutory intent* an unconstitutional result was not contemplated. *See Kent* v. *Dulles,* 357 U.S. 116, 130 (1958). Apparently, they did just that. *See Robinson II,* 65 Hawaii at 660 & nn. 15-17, 658 P.2d at 301-02 & nn.15-17, A 38 & nn.15-17.

(1974).[21] Eleven years later, these claims are back before this Court because the lower federal courts did not.

B. The Proceedings Below: *Robinson I, II,* and *III*

Even before this Court could consider direct review of *McBryde II,* the private landowners commenced a new action in the United States District Court for the District of Hawaii to enjoin, on the basis of the same constitutional violations claimed in this Court,[22] all "proceedings carrying out the judgment of the Supreme Court [of Hawaii]." Complaint ¶ 14, *Robinson* v. *Ariyoshi,* No. 74-32 (D. Hawaii Feb. 14, 1974), A 275.

1. What the United States District Court Did

The District Court ruled in 1977.[23] Using as an organizing analogy a cannibalistic ritual in which the

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[21] The State moved to dismiss the appeal because McBryde and Olokele had not attacked a state statute, *see* Motion to Dismiss Appeal at 10, *McBryde Sugar Co.* v. *Hawaii,* No. 73-1440 (U.S. May 23, 1974), and hence this Court's obligatory jurisdiction under 28 U.S.C. § 1257(2) (1970) had not been invoked. The Court seemingly agreed. *See* 417 U.S. at 962. The State opposed the petitions for certiorari on the merits. *See* Response To, Jurisdictional Statement Or, in the Alternative, Petitions for Writ of Certiorari at 2, *McBryde Sugar Co.* v. *Hawaii,* Nos. 73-1440, 73-1441, 73-1442 (U.S. May 23, 1974).

[22] G&R named petitioners as empowered to enforce *McBryde II, see* Complaint ¶ 13, A 275. G&R also sued McBryde, Olokele, and the Small Owners as nominal defendants, who named petitioners in cross-claims. *See Robinson I,* 441 F. Supp. at 562, A 58.

[23] The complaint admitted the state court denied the landowners' petitions, A 274, and the State officials moved to dismiss. *See* A

private landowners were the "victim[s]" of the "culinary creations" of the Justices of the Supreme Court of Hawaii, *Robinson I,* 441 F. Supp. at 565, A 65, the District Judge found *McBryde I*'s analysis "specious[,]," *id.* at 567, A 68, "conclusatory," *id.* at 568, A 71, and lacking in "integrity," *id.* at 569, A 73, —"strictly a 'public-policy' decision with no prior underlying 'legal' justification therefore," *id.* at 566, A 67. The court found the Justices "refused to hear or consider [the] constitutional claims [presented in the petitions for rehearing]," *id.* at 572, A 79; *see also id.* at 584 n.35, A 104 n.35, and, hence, "plaintiffs have been deprived of property rights without ever having had a fair and meaningful opportunity to defend," *id.* at 580, A 96. The court held *McBryde* had "taken" the landowners' property by ruling "the State owns all surplus water" and by "restraining the free diversion of surface waters for use outside the lands . . . to which they are appurtenant," *id.* at 586, A 107. *McBryde I* was held to that extent "untenable and void." *Id.* The District Court's judgment declared G&R entitled to the rights held by *McBryde I* to have

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284 (motion). After this Court acted, the District Judge orally denied the motion, stating the federal issues, "which are the key and the heart here[,] were *never* litigated[.]" Tr. 70, *Robinson* v. *Ariyoshi,* No. 74-32 (Sept. 6, 1974) (emphasis added), *see* A 291. The State officials answered, alleging lack of jurisdiction and preclusion. State Answer at 1-2, (Sept. 16, 1974), A 294-95. For the "trial," petitioners designated extensive parts of the *McBryde* litigation record for the court's consideration, including all of the memoranda and petitions filed after *McBryde I.* State Officials' Designation, (April 1, 1975), A 297. "Trial" was held April 26-27, 1976.

been reserved for the sovereign by the Land Commission *Principles* of 1846, and that, contrary to *McBryde I,* the private landowners were without limitation entitled to divert water obtained by appurtenant right "beyond the watershed of origin or for use on lands other than those giving rise to water rights." Judgment, (Mar. 2, 1978), A 263-67. The Court permanently enjoined the State officials from ever "attempting to prevent" the exercise of such rights on the basis of *McBryde. Id.*

2. What the United States Court of Appeals Did

Three years after appeal was taken, the Court of Appeals certified six questions to the Supreme Court of Hawaii seeking clarification of the *McBryde* judgment, A 414.

a. *The State Court's Clarification of* McBryde

On December 29, 1982, Chief Justice Richardson replied for a unanimous court, making three critical points. First, the District Court had overlooked important aspects of state law in concluding that "for over 100 years . . . surface water was held to be freely transportable out of its watershed" and that the right to "surplus water [was] superior to [those of] the State," *Robinson I,* 441 F. Supp. at 581, 583, A 98-99, 102. The Justices provided detailed analysis showing the state law issues were at least debatable. *See Robinson II,* 65 Hawaii at 649 n.8, 667-73, 658 P.2d at 295 n.8, 305-10, A 20 n.8, 42-51. Second, whatever the law of Hawaii prior to *McBryde I,* under Hawaii's law of preclusion the state court's rejection of the facial constitutional attack on *McBryde I* raised by the private landowners' petitions for rehearing was not open

to relitigation in the courts of Hawaii. *Id.* at 662, 658 P.2d at 302-03, A 36.

Third, and crucially, the District Court had seriously misinterpreted the judgment in *McBryde.* Whereas the District Court seemingly assumed "the water rights confirmed to [the State] . . . were like so many bushels of wheat, to be bartered, sold, or shifted about as the Government might see fit[,]" *Nevada* v. *United States,* 463 U.S. 110, 126 (1983),

> *McBryde* did not discuss and therefore cannot be understood to be conclusive of the circumstances under which a private party or the State could obtain injunctive relief against unsanctioned transfers. And, even in circumstances where some relief would be appropriate, the issuance of any injunction would of course be subject to all of the considerations that serve to limit equitable relief. These limiting doctrines include estoppel, laches, and most particularly with respect to wrongful diversion of water, the public use doctrine as applied to our own unique situation.

Robinson II, 65 Hawaii 648-49, 658 P. 2d at 295, A 19-20.[24] Indeed, insofar as "*McBryde* necessarily left unresolved factual and legal issues that would require a determination by a trial court prior to any final judgment respecting the distribution of the waters of the Hanapepe[, . . . including] the nature and scope of any remedies to be afforded the parties," *id.* at 653, 658 P.2d at 297, A 24-25, the private landowners would have *yet another* opportunity to assert federal claims in state proceedings, ongoing since 1959, if *McBryde,* as *applied,* worked an unconstitutional result. *Id.* at 666-67, 658 P.2d at 305, A 42.

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[24] *See also id.* at 674, 658 P.2d at 310, A 51 (state may not "do with the property as it pleases").

b. *The Opinion Below*

Having received responses from the Supreme Court of Hawaii that effectively disposed of the landowners' federal claims on state-law grounds, the Court of Appeals, incomprehensibly, *see Kolender* v. *Lawson,* 461 U.S. 352, 355 (1983), ignored every one of those answers. While agreeing "the state officers in these proceedings have taken no steps to interfere with plaintiffs' property, and have denied that they are presently planning to take such steps," *Robinson III,* 753 F.2d at 1474, A 13, the court ingeniously found a "case or controversy" in the "cloud upon the title of plaintiffs" cast by "the language of *McBryde I* and *II,*" *id.* at 1471, A 6. To avoid the bar imposed by 28 U.S.C. § 1257 (1982) on relitigation of "final determinations of [the highest court of a state] in judicial proceedings[,]" *District of Columbia Court of Appeals* v. *Feldman,* 460 U.S. 462, 476 (1983), the court held, because it was "ambiguous" whether the constitutional challenges to *McBryde I* were, in fact, decided by the state court, those questions must be presumed "never [to have been] decided by a state court." 753 F.2d at 1472-73, A 8-9. This same presumption sufficed to overcome the requirements of 28 U.S.C. § 1738 (1982), regardless of the preclusive effect of denial of petitions for rehearing under state law, and even assuming the petition process constituted the "process due" the landowners' facial attack on *McBryde.* 753 F.2d at 1472, A 8. Despite state court proceedings in which enforcement of *McBryde* would have been subject to further challenge, the court aborted those proceedings by reaching "the merits" and affirming "in all respects" the District Court's wholesale invalidation of *McBryde.*

Id. at 1473-75, A 9-13.[25] In its abrupt analysis, the Court of Appeals did not cite the well-researched answers of the Justices even once.

REASONS FOR GRANTING THE WRIT

The factors enumerated in this Court's Rule 17 governing certiorari jurisdiction are compellingly present in this case. This is no academic dispute. Permitted to stand, the judgment of the Court of Appeals will have wide ranging, permanent effects throughout the State of Hawaii, from the wettest forests in Hanapepe to the driest kuleanas of the Kona coast. No matter how severe the drought, or public need, the three-judge panel's facial invalidation of the Supreme Court of Hawaii's construction of Land Commission power, and private right, effectively precludes regulation of water use except upon payment of compensation,[26] and elevates a State's acquiescence in water usage into an inalterable private right "to use the water for any purpose, . . . to waste the water, and . . . to prevent others from using the water." McBryde Post-Trial Opening Brief at 77, *McBryde Sugar Co.* v. *Robinson,* S.P. No. 108 (Hawaii Cir. filed Sept. 20,

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[25] Although the court vacated the injunction entered against the State officials and remanded for entry of a new judgment, no such judgment has been entered by the District Court as of this writing.

[26] The Court of Appeals' acknowledgment of the State's right "to affect property rights vesting after the law is changed," 753 F.2d at 1474, A 11, rings hollow when by its decision every Land Commission award has "vested" the same rights asserted by respondents. *See Nevada* v. *United States,* 463 U.S. 110, 130 n.11 (1983) (quoting *Parklane Hosiery Co.* v. *Shore,* 439 U.S. 322, 326 n.5 (1979)).

1965), A 323. Disregarding limitations on federal jurisdiction delineated in dozens of this Court's decisions, the decision below creates a flagrant "conflict with a state court of last resort," Sup. Ct. R. 17.1(a),[27] and charts a radical expansion of federal judicial control over the thousands of square miles of territory that comprise the States within the ninth judicial circuit. Because the decision below fundamentally alters core relationships not only among state and federal courts, but among this Court and the inferior federal courts, the writ should be granted, and the judgment reversed.

I. The Decision Below Turns The System For Review Of State Court Judgments Upside Down.

This Court's construction of 28 U.S.C. § 1257 (1982) in *District of Columbia Court of Appeals* v. *Feldman*, 460 U.S. 462 (1983), *cited, Robinson III*, 753 F.2d at 1471, A 6-7, could not be clearer: "[A] United States District Court has no authority to review final judgments of a state court in judicial proceedings. Review of such judgments may be had only in this Court." 460 U.S. at 482. To overcome this rule, the court below presumed, because the decision in *McBryde II* did not explicitly state the private landowners' constitutional claims to be without merit, that *McBryde II* did not pass upon those claims. Thus, the court wrote assuringly, "we are in no danger of serving impermissibly in an appellate role vis-a-vis the Hawaii state court." *Robinson III*, 753 F.2d at 1473, A 9.

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[27] This conflict extends not only to *McBryde* but to the Supreme Court of Hawaii's subsequent efforts to apply *McBryde's* principles equitably, and within the limits of the Constitution. *See Reppun* v. *Board of Water Supply*, 65 Hawaii 531, 656 P.2d 57 (1982), *cert. denied*, 105 S. Ct. 2016 (1985).

Though cloaked in the language of deference, the court's presumption of "non-decision" is sheer casuistry. This Court's decisions emphatically hold that state courts of general jurisdiction are fully empowered, and *obligated* to adjudicate federal constitutional claims. *See, e.g., Ake* v. *Oklahoma,* 105 S. Ct. 1087, 1093 (1985); *Hawaii Housing Authority* v. *Midkiff,* 104 S. Ct. 2321, 2328 (1984); *Illinois* v. *Gates,* 462 U.S. 213, 221-22 (1983); *Rose* v. *Lundy,* 455 U.S. 509, 518-19 (1982); *Allen* v. *McCurry,* 449 U.S. 90, 105 (1980). The Ninth Circuit's presumption of non-decision radically undermines state court power by dictating that whenever a state court has not explicitly ruled on a timely presented federal claim it has retroactively destroyed its jurisdiction over such questions. Moreover, the presumption of non-decision, taken seriously, requires overruling more than 175 years of precedent and deprives *this* Court of direct appellate jurisdiction whenever a state's high court eschews discussion of constitutional issues. *Compare Robinson III,* 753 F.2d at 1473, A 9, *with Illinois* v. *Gates,* 462 U.S. at 218 (citing *Owings* v. *Norwood's Lessee,* 9 U.S. (5 Cranch) 344 (1809)). In short, the decision below turns the congressionally mandated system of appellate review of state court judgments upside down. In the eyes of the court below, whenever state courts do not explicitly discuss federal claims "[the Supreme Court will have] no authority to review final judgments of a state court in judicial proceedings. Review of such judgments may be had only in [the inferior federal courts]."

Feldman does not sanction this incongruous result. It requires that whenever federal constitutional claims are timely raised in a state court proceeding, the ren-

dering of judgment by the highest court of a state[28] inconsistent with those claims jurisdictionally bars relitigation in the inferior federal courts. Even if a plaintiff "failed to raise his constitutional claims in the state court[,]" 460 U.S. at 483 n.16, which *is not* the case here, section 1257 ousts lower federal court jurisdiction if those claims "are inextricably intertwined" with the state court judgment, *id.* Even if the landowners *never* asserted federal claims by petition for rehearing following *McBryde I, Feldman* bars the *Robinson* action, for the premise of that action is that *McBryde II,* however applied, is not supported by any adequate state ground and thus the state court must *be deemed* to have "rule[d], either explicitly or implicitly, on the merits of the constitutional question." *Ake* v. *Oklahoma,* 105 S. Ct. 1087, 1093 (1985).[29] The Ninth Circuit's misapplication of this Court's ruling in *Feldman* is so clear that even summary reversal would not be unwarranted.

II. The Court Below Disregarded The Hallmark Of "Takings" Law: Regulations That "Take" Must Be Tested "As Applied."

Assuming that *McBryde I* and *II* set forth a broad, new scheme for regulating water use in Hawaii, the court below, in reaching the merits of respondents' constitutional claims, flouted the rule stated "in sev-

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[28] *Feldman* and the mandate of 28 U.S.C. § 1738 are thus *not* "two sides of the same coin," *Robinson III,* 753 F.2d at 1472, A 8, since *Feldman* operates *regardless* of state law rules of preclusion.

[29] As the District Judge wrote, it is not what a state court "may say or even what it may intend; the measure is by the result." *Robinson I,* 441 F. Supp. at 585, A 106.

eral recent decisions" that "a claim that the application of government regulations effects a taking of a property interest is not ripe until the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue." *Williamson County Regional Planning Comm'n* v. *Hamilton Bank,* 105 S. Ct. 3108, 3117 (1985); *see Hodel* v. *Virginia Surface Mining & Reclamation Ass'n,* 452 U.S. 264, 297 (1981). Having explicitly recognized that the regulatory machinery had not even been set in motion by petitioners, *Robinson III,* 753 F.2d at 1474, A 13, let alone "reached a final decision," the court below amazingly ignored this jurisdictional limitation by affirming the District Court's declaratory rulings "in all respects."

This cavalier exercise of federal jurisdiction to abort state regulatory processes before they have run their course is one of the most dangerous aspects of the decision below. This Court has noted on many occasions that "mere enforcement authority does not create a case or controversy [under the Constitution] with the enforcement official," *Supreme Court of Virginia* v. *Consumers Union,* 446 U.S. 719, 736 n.15 (1980) (citations omitted); *see Laird* v. *Tatum,* 408 U.S. 1, 13 (1972). Respondents could not show *McBryde I* to be "unconstitutional on its face," *O'Shea* v. *Littleton,* 414 U.S. 488, 496 (1974), because such a ruling is incompatible with "the very nature of the inquiry required by the Just Compensation Clause." *Williamson County,* 105 S. Ct. at 3119. Respondents did not show *McPryde I* to be "unconstitutional . . . as applied," *O'Shea,* 414 U.S. at 496, because, as even the court below acknowledged, *it has not been applied.* In sum, this "is not a lawsuit to enforce a right; it is an en-

deavor to obtain a court's assurance that a [rule of law] does not govern hypothetical situations that may or may not make the challenged [rule] applicable." *I.L.W.U. Local 37* v. *Boyd,* 347 U.S. 222, 224 (1954). The state court proceedings required prior to any restraint on exercise of alleged property rights present a classic occasion for abstention, *see Hawaii Housing Authority* v. *Midkiff,* 104 S. Ct. 2321, 2327 (1984) (citing, *e.g., Railroad Comm'n* v. *Pullman Co.,* 312 U.S. 496 (1941)); *see also Zablocki* v. *Redhail,* 434 U.S. 374, 380 n.5 (1978). Even if principles of comity do not counsel restraint, *but see Moore* v. *Sims,* 442 U.S. 415, 427-30 (1979), the Declaratory Judgment Act and Constitution require it. Lack of a "case" or "controversy" compels granting the writ.[30]

III. The Court Below Wholly Ignored This Court's Construction Of The Full Faith And Credit Statute.

This Court's decisions repeatedly stress that the Full Faith and Credit Statute, 28 U.S.C. § 1738 (1982), "requires a federal court to look first to state preclusion law in determining the preclusive effects of a state court judgment." *Marrese* v. *American Academy of Orthopaedic Surgeons,* 105 S. Ct. 1327, 1332 (1985); *Migra* v. *Warren City School Dist.,* 104 S. Ct. 892, 896 (1984); *Haring* v. *Prosise,* 462 U.S. 306, 314 n.8 (1983); *Kremer* v. *Chemical Constr. Corp.,* 456 U.S. 461, 481-82 (1982); *Allen* v. *McCurry,* 449 U.S. 90, 96

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[30] *See Steffel* v. *Thompson,* 415 U.S. 452, 458 (1974). Because a "controversy" could exist only if petitioners sought to enforce *McBryde,* respondents could not *ever* satisfy the "well-pleaded complaint rule" that applies to declaratory judgment jurisdiction. *See Franchise Tax Bd.* v. *Construction Laborers Vacation Trust,* 463 U.S. 1, 16 & n.14 (1983).

(1980). Having improperly assumed jurisdiction, the court below blatantly ignored this admonition by following its presumption of non-decision and its own interpretation of preclusion law,[31] rather than the Justices' clear answer, *see* 65 Hawaii at 660-62, 658 P.2d at 302-03, A 34-36, that Hawaii law barred relitigation of the facial attacks on *McBryde I*, *Robinson III*, 753 F.2d at 1472, A 8.

Although this error is obvious, *see Grubb* v. *Public Utils. Comm'n*, 281 U.S. 470, 477-78 (1930); *Southern Pacific Transp. Co.* v. *Public Utils. Comm'n*, 716 F.2d 1285, 1287, 1289 (9th Cir. 1983), *cert. denied*, 104 S. Ct. 1908 (1984), petitioners recognize what is at stake is not what the court below said, but what it did. Because the ruling below on preclusion[32] could be valid, however, only if the Hawaii Supreme Court's rehearing process did not meet "the requirements of the . . . Due Process Clause," *Marrese* v. *American Academy of Orthopaedic Surgeons*, 105 S. Ct. at 1332; *see Kremer* v. *Chemical Construction Corp.*, 456 U.S. at 482-85, the Ninth Circuit's judgment is so flawed that to sustain it would require invalidating procedures common to appellate courts across the Nation, including that which will be employed by *this* Court in evaluating *this* Petition.

The state law rehearings process must be viewed in context. "[N]o single model of procedural fairness,

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[31] Petitioners include within "preclusion" the "corollary doctrine[s]" of res judicata and collateral estoppel. *Nevada* v. *United States*, 463 U.S. 110, 130 & n.11 (1983).

[32] Preclusion applies not only to claimed violations of due process but also to claimed failures to give preclusive effect to a prior judgment. *See Underwriters Nat'l Assur. Co.* v. *North Carolina Life & Accident & Health Ins. Guar. Ass'n*, 455 U.S. 691, 706 (1982).

let alone a particular form of procedure, is dictated by the Due Process Clause." *Kremer,* 456 U.S. at 483. The constitutional issues presented by the state court petitions for rehearing involved pure questions of law: Did the court's reading of Hawaiian statutes and prior court decree on its face violate the Constitution?[33] *Cf. Cleveland Bd. of Educ.* v. *Loudermill,* 105 S. Ct. 1487, 1494 (1985) (issues "involv[ing] factual disputes"). The landowners were granted *four months* to develop those arguments, which were distributed to all five Justices of the Supreme Court of Hawaii, who deliberated nearly a month before *granting* reargument on allegedly unconstitutional state-law determinations. If additional oral argument as to the facial attack on *McBryde I* was required by the Constitution, *but see Califano* v. *Yamasaki,* 442 U.S. 682, 696 (1979), then no legal process that permits final disposition on papers alone is immune from attack. *See, e.g.,* Sup. Ct. R. 22.4 (disposition of petitions for certiorari). The radical invalidation of Hawaii's rehearing process, which was critical to the Court of Appeals' refusal to apply Hawaii's law of preclusion, requires that the writ issue.[34]

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[33] The Justices' answers make clear that preclusion applies to the facial attack, for respondents may litigate the validity of *McBryde* as applied *if* petitioners seek enforcement, *see* 65 Hawaii at 649-50, 658 P.2d at 295, A 19-20. There thus exists a "panoply of procedures," *Kremer,* 456 U.S. at 484, to vindicate respondents' rights. Indeed, since the Justices' answers assure respondents what they demand—a "predeprivation" hearing—this case is *moot. See Iron Arrow Honor Society* v. *Heckler,* 104 S. Ct. 373, 375 (1983) (per curiam).

[34] Should the Court grant the writ, and concur that the Court of Appeals properly reached "the merits" of respondents' federal claims, it would be within this Court's prerogative to review the

CONCLUSION

Notwithstanding its own recognition that the State officials have done nothing to interfere with respondents' alleged property rights, the Court of Appeals invalidated, on its face, a judicial opinion of the highest court of our 50th State, and, absent constitutional amendment, changed forever the ability of government to regulate the use of fresh water in the Hawaiian Islands. To do so, the Court of Appeals presumed the Justices of the Supreme Court of Hawaii incompetent to decide federal constitutional questions that come before them, and implicitly held unconstitutional the everyday judicial act of dispensing with oral argument when amply researched memoranda provide a sufficient basis for decision. The lasting impact of the Court of Appeals' decision only highlights the importance of the limitations on federal jurisdiction that the court below wholly and flagrantly ignored. The writ should be granted, and the judgment reversed.

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ultimate holding below—that state courts can "take" property "for public use" by declaring the law and that respondents had "more than a 'unilateral expectation or an abstract need[,]' " *Ruckelshaus* v. *Monsanto Co.*, 104 S. Ct. 2862, 2875 (1984) (citation omitted); *cf. Oregon ex rel. State Land Bd.* v. *Corvallis Sand & Gravel Co.*, 429 U.S. 363. 382 (1977) (overruling prior law to "more closely conform to the expectations of property owners"), such that *McBryde*, on its face, constituted a "taking of property." *See Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137 (1803). Framing the issue thusly assumes the decisions discussed above will be overruled, but the issue " 'lurk[s] in the background,' " *Franchise Tax Bd.*, 463 U.S. at 12 (citation omitted), and is "fairly included" in the second question presented herein, *see* Sup. Ct. R. 21.1.

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